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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS R. CRUZ,
Petitioner,

v.

H. S. KNIGHT, Director,
United States Secret Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether petitioner, a senior, career Secret Service Special Agent has been deprived of constitutionally protected property rights without due process of law where the grievance examiner appointed by the agency to investigate the propriety of an agency order permanently transferring petitioner from Miami, Florida, to Newark, New Jersey (1) made no investigation concerning why petitioner was being transferred; (2) denied petitioner the right to be represented by counsel during the grievance proceedings; (3) denied petitioner and his counsel the opportunity to examine the entire grievance file; and (4) further denied petitioner and his counsel the opportunity to file written comments prior to issuance of the examiner's Report of Findings and Recommendations, all of which rights are specifically guaranteed to petitioner in 5 C.F.R. Part 771 and the agency's own grievance procedures.

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LOUIS R. CRUZ,
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H. S. KNIGHT, Director,
United States Secret Service,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Louis R. Cruz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 9, 1981.

OPINIONS BELOW

The court of appeals issued no opinion; the court's judgment is set forth in the Appendix at 1a. The opinion of the district court, also unreported, appears at Appendix 3a.

JURISDICTION

The court of appeals entered judgment on January 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

The relevant sections of 5 C.F.R. Part 771, setting forth the regulations under which the Secret Service was required to establish an agency grievance system, appear at Appendix 7a. The additional relevant sections of the agency grievance regulations are set forth in the Statement of the Case.

STATEMENT OF THE CASE

This case involves the efforts of a Secret Service Special Agent to obtain the rights specifically guaranteed him by the agency's grievance system under which petitioner is questioning the propriety of an agency order directing his permanent, lateral transfer from Miami, Florida, to Newark, New Jersey. Petitioner filed suit for injunctive relief from the transfer contending *inter alia* that the failure of the grievance examiner to comply with agency grievance regulations constituted an unlawful taking of his constitutionally protected property rights. The district court's conclusion that the procedural deficiencies in the grievance process were constitutionally harmless was affirmed by the court of appeals.

1. Statutory and Administrative Framework

The rules and regulations governing the grievance filed by petitioner were promulgated by the Civil

Service Commission on September 9, 1974, 5 C.F.R. Part 771.[1]

The purpose of 5 C.F.R. Part 771 was to set forth the regulations under which each executive agency was required to establish and administer an agency grievance system. § 771.101.[2] With certain exceptions not here applicable, a grievance and the scope of the grievance coverage is described in Part 771 as encompassing "any matter of concern or dissatisfaction to an employee which is subject to the control of agency management." § 771.102(d) and § 771.108 (a).

Following the mandate of Part 771, the Secret Service established its own grievance system to carry out the following agency policy:

> It is the policy of the U.S. Secret Service to afford its employees a simple, orderly method of obtaining due consideration of their dissatisfaction with matters affecting them personally that are subject to management control. Employee

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[1] Federal Register, Vol. 39, No. 175, p. 32542. The rules and regulations governing federal employee grievances were promulgated pursuant to the authority granted in 5 U.S.C. §§ 1302, 3301, 3303; E.O. 10577, 3 C.F.R. 1954-1958 Comp., p. 218; and E.O. 10987, 3 C.F.R. 1059-1963 Comp., p. 519. 5 C.F.R. Part 771 was revised after commencement of the instant law suit. 44 Federal Register 77131, December 31, 1979. The controlling version of the regulations is set forth in the Appendix at 7a.

[2] Certain agencies are exempted from the coverage of the grievance regulations: the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Energy Research and Development Administration, the Nuclear Regulatory Commission, the Tennessee Valley Authority, and the U.S. Postal Service. § 771.103(b).

> grievances shall receive impartial consideration and shall be settled as close to their source, as promptly and as fairly as possible. All employees will have access to this procedure. Personnel Policy Manual (hereinafter "PPM") Chapter 12, I.

The Secret Service made its grievance system available to "[a]ny Secret Service employee . . . to attempt resolution of matters of concern that are subject to the control of agency management." PPM Chapter 12, I.B.

Both the Civil Service Commission regulations and those adopted by the Secret Service provide that an employee filing a grievance has the right to be accompanied, represented and advised by a person of his own choosing. § 771.105(2); PPM Chapter 12, I.D.(3). The employee is also guaranteed a reasonable amount of official time to perfect his grievance if he is on active duty. § 771.105(3); PPM Chapter 12, I.D.(4).

The Secret Service grievance system provides that upon the filing of a formal grievance, the agency deciding official must first "determine whether the grievance is timely, is covered by the grievance system and has been processed through the informal procedure." PPM Chapter 12, III. E. After acceptance of a formal grievance the agency must select a grievance examiner other than a Secret Service employee. PPM Chapter 12, III. F.[3]

The selected grievance examiner is required to "conduct [the] inquiry in accordance with Treasury Per-

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[3] This is to insure that the examiner will be "fair, impartial, and objective," as required by 5 C.F.R. § 771.116(c).

sonnel Manual Chapter 771, Subchapter 3." PPM, Chapter 12, III. F. Chapter 771 of the Treasury Personnel Manual is virtually identical to the mandatory provisions of 5 C.F.R. 771.116 which state in part as follows:

> (d) The examiner shall conduct an inquiry of a nature and scope appropriate to the issues involved in the grievance. At the examiner's discretion, the inquiry may consist of:
>
> (1) The securing of documentary evidence;
>
> (2) Personal interviews;
>
> (3) A group meeting;
>
> (4) A hearing; or
>
> (5) Any combination of paragraphs (d)(1) through (4) of this section.
>
> * * * * *
>
> (g) The examiner shall establish a grievance file containing all documents related to the grievance, including statements of witnesses, records or copies thereof, and the report of the hearing when a hearing was held. *On completion of his inquiry, the examiner shall make the grievance file available to the employee and his representative for review and comment. Their comments, if any, shall be included in the file.*
>
> (h) *After the employee and his representative have been given an opportunity to review the grievance file, the examiner shall prepare a report of his findings and recommendations and submit that report, with the grievance file, to the deciding official.* The examiner shall also furnish the employee and his representative a

copy of the report. (Emphasis added.) Appendix at 17a, 20a.

2. Statement of Facts

Petitioner Louis R. Cruz, a career Secret Service Special Agent, has been stationed in Miami, Florida, since his employment with the Secret Service in January 1966.[4] Because of his fluency in Spanish, petitioner is of special value to the Secret Service in the Miami field office. In 1968, petitioner and his wife purchased their first and only home with the aid of a VA mortgage. Petitioner's five children were living at home at the time of the transfer order. Four were pursuing college-level educations and one daughter was attending high school.

On May 2, 1979, petitioner was notified that after thirteen and one-half years in Miami where heretofore there had been a great need for his Spanish speaking abilities, he was to be permanently transferred on July 29, 1979, to Newark, New Jersey. He was instructed to make immediate arrangements for the sale of his house. By memorandum dated May 9, petitioner requested an explanation for this un-

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[4] Petitioner, 50, grew up in New York, one of six children born to a Puerto Rican father. While in the Air Force during the Korean conflict he met and married his wife, one of seven children born to Mexican parents living in rural Texas. After discharge from the Air Force, petitioner, with the assistance of his wife, worked his way through the University of Texas. Following a brief stint with the U.S. Customs Service as a port investigator, he joined the Secret Service as a GS-7. He is now a GS-13, Step 6. Petitioner's tenure with the Secret Service has been one of distinction and dedication. He has received numerous awards, citations and other commendations.

usual transfer coming so late in his career. The Assistant Director of the Office of Investigations responded that he saw no need to rescind the transfer order. On May 23 petitioner was advised by the Secret Service Personnel Division to treat the written exchange with the Assistant Director as an informal grievance and to submit a formal grievance. That same day petitioner filed with the Secret Service a formal grievance questioning whether the proposed transfer was for the "needs of the Service." [5]

On June 15, 1979, Secret Service Deputy Director Myron I. Weinstein, as the ultimate deciding agency official, concluded that petitioner's formal grievance was timely; that it was covered by the agency's grievance system; and that it had been processed through the required informal procedures. Pursuant to agency regulations, on August 7, 1979, Mr. Charles E. Coffey of the Department of Treasury, Washington, D.C., was designated to conduct the inquiry into petitioner's grievance. Petitioner's scheduled transfer was postponed pending resolution of the formal grievance.

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[5] As a senior Special Agent petitioner had a reasonable expectation that he could be transferred only for the "needs of the Service." This was based on a memorandum published by Secret Service Director H. S. Knight on March 4, 1976, which sets forth what had long been the practice of the agency. The memorandum provides in part:

1. A newly hired agent will be permanently transferred between his second and fifth years of employment.
2. While still at the journeyman level (GS-12) he may be again permanently transferred.
3. Additional permanent transfers may be made according to the *needs of the Service.* (Emphasis added.) Appendix at 22a-23a.

On August 13-14, 1979, Mr. Coffey informally interviewed petitioner and five other special agents at the Miami field office. Petitioner advised Mr. Coffey that he desired to be represented by counsel as was his right under the agency grievance system. Upon his return to Washington, Mr. Coffey was contacted by petitioner's counsel who informed Coffey that he wanted an opportunity to make a presentation on petitioner's behalf. Despite this request, Mr. Coffey refused to permit counsel to participate in the formal grievance proceedings. Moreover, Mr. Coffey failed to make all of the documents in the grievance file available to petitioner and his counsel for "review and comment" prior to the presentation of the examiner's report as required by the grievance regulations. 5 C.F.R. § 771.116(g).

On September 11, 1979, Mr. Coffey submitted to Deputy Director Weinstein a Report of Findings and Recommendations.[6] Mr. Coffey recommended that the transfer order be sustained. The recommendation was made without any investigation concerning the "needs of the service" for the transfer. To the contrary, Mr. Coffey concluded that petitioner, and inferentially any other special agent, could be permanently transferred "without explanation."[7] He did

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[6] Attached to Mr. Coffey's report were summaries of the interviews he conducted. These summaries were unsigned and were never shown to the persons who were interviewed.

[7] Mr. Coffey was apparently unaware of the existing written policy of the Secret Service that in the case of senior agents above the journeyman level "additional permanent transfers may be made according to the needs of the service." See fn. 5 at page 7. Based on his limited investigation, the examiner was "convinced that there was no rule, written or implied, that states an agent will not be transferred after a certain age."

find that the five agents interviewed in Miami were "unanimous" that petitioner's proposed transfer should be revoked and further that the transfer would cause irreparable harm to petitioner and his family.

On October 1, 1979, Deputy Director Weinstein issued the final agency decision. He adopted the grievance examiner's recommendation to sustain the transfer order.

On December 14, 1979, petitioner filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Columbia. On February 5, 1980, the district court denied injunctive relief and dismissed the case with prejudice. In its order, the court concluded that petitioner had exhausted his administrative remedies concerning the formal grievance and that the court had subject-matter jurisdiction. Petitioner's complaint asserted jurisdiction under 28 U.S.C. § 1331.

On February 7, 1980, petitioner filed a notice of appeal and an emergency motion for stay or injunction pending appeal. That same day the court of appeals issued a temporary stay to permit additional briefing in support of petitioner's claim of irreparable harm. On April 1 the court of appeals denied the government's motions to vacate the stay and for summary affirmance; petitioner's motion for a continued stay was granted. Following briefing and argument, on January 9, 1981, the court of appeals issued a judgment affirming the district court. Thereafter, the court of appeals stayed its mandate until March 2, 1981, to permit the filing of this petition.

REASONS FOR GRANTING PETITION

This case presents a far-reaching issue of federal law involving the nature and scope of rights of career federal employees under agency grievance procedures. More particularly, it raises the issue of whether the procedural rights granted to career federal employees under the express terms of an agency grievance system constitute a part of the fabric of constitutional due process with which an agency must comply, or whether, as held by the court below, an agency can disregard its own regulations with impunity.

Petitioner, a career Secret Service Agent, sought by means of the agency grievance system to question the validity of his transfer from one part of the country to another. It is undisputed that there is an enormous economic and psychological impact on senior, career federal employees who are suddenly ordered by their agencies to sell their homes, uproot their families and give up long-established community ties. To those affected, such employment action in many instances is more severe than an employment termination decision. Although this Court has spoken concerning due process rights available to government employees in termination cases, it has never defined the constitutional process due a career federal employee who uses agency grievance procedures to question the propriety of a proposed transfer. The Court should now consider this basic issue.

A large number of cases are currently arising in the lower courts in which loyal, dedicated federal employees are asserting that under the terms of their employment, they are entitled to a rational determination by a fair and impartial person, after some

form of hearing, that a transfer order is being made for the legitimate needs of their federal employer. If the decision of the district court is affirmed it will mean that despite clearly applicable federal regulations, career secret service agents and presumably other career federal employees can be permanently transferred without explanation.

The importance of the issue to the federal employee system, the devastating consequences to petitioner if the transfer order remains, and the district court's clearly erroneous holding combine to warrant review by this Court. The district court's opinion is incorrect for three reasons. First, petitioner has a legitimate constitutionally protected property interest that as a senior, career Secret Service agent he would be permanently transferred only for the needs of the service and that under the agency's grievance system he has the right established by law to obtain a fair and impartial investigation concerning why he is being transferred so late in his career. Second, under the terms of the agency's grievance system, due process of law guarantees petitioner the right to notice of the reasons why the agency is ordering his transfer; the right to make comments with the assistance of counsel upon the agency's stated reasons for the transfer; and the right to offer evidence on his own behalf to the grievance examiner prior to the preparation of the examiner's report and recommendations. Third, the agency's deviations from the required grievance procedures were not insubstantial but rather went to the very essence of the grievance system and effectively blotted out petitioner's constitutional right to fundamental fairness.

I.

Constitutionally protected property interests are created and their dimensions are defined by existing rules and understandings which secure certain benefits and support claims of entitlement to those benefits. To have a property interest in a benefit a person must have a legitimate claim of entitlement to it. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); *Perry* v. *Sinderman*, 408 U.S. 593, 600-603 (1972). In *Sinderman*, the Court stated:

> A person's interest in a benefit is a "property interest" for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke a hearing. 408 U.S. at 601.

Roth and *Sinderman* demonstrate that a property interest can be established by mutual understanding between employer and employee even in the absence of a written contract. The "source of a protected property right might be implicit in the overall workings of a particular government employer." *Colm* v. *Vance*, 567 F.2d 1125, 1128 (D.C. Cir. 1977). This understanding may be found from the "objective indicia supporting such a claim in a government statute, regulation, or in agency-fostered policies or understanding." *Id.* at 1131.[8]

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[8] In *Kizas* v. *Webster*, 492 F. Supp. 1135 (D.C. D.C. 1980), the court held that the adoption of a new system for the selection of special agents for the FBI and the removal of a preference formerly accorded clerical employees constituted a taking of the constitutionally protected property interests of clerical employees who had accepted their clerical positions in reliance on the Bureau's former policy.

In *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), this Court made clear that the rights and procedures contained in statutes and agency regulations dealing with the federal personnel system are an integral part of the bargain struck between federal employer and employee and create for the federal employee a property interest under *Roth* and *Sinderman*.

In the instant case the transfer policy of the Secret Service, as published by the Director on March 4, 1976, created a legitimate expectation on the part of career special agents that (1) a newly-hired agent would be permanently transferred between his second and fifth year; (2) that while still at the journeyman level (GS-12) the special agent may again be permanently transferred; and (3) thereafter additional permanent transfers might be made but only "according to the needs of the Service."

Additionally, the grievance system adopted by the Secret Service, as required by 5 C.F.R. Part 771, guaranteed to senior Secret Service agents that if they believed a late-in-career, permanent transfer was not for the needs of the service, they were entitled to a fair and impartial investigation by a person who was not an employee of the Secret Service in accordance with the procedures set forth in 5 C.F.R. § 771.116.

In sum, the agency's written transfer policy coupled with the agency's grievance system clearly provided to petitioner a "property interest" protected by procedural due process.

II.

Once it has been determined that a person has a constitutionally protected property interest, the

"question remains what process is due." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). At the very minimum, due process requires that petitioner be afforded the procedural rights which are guaranteed to him by the plain language of 5 C.F.R. Part 771. *Arnett* v. *Kennedy, supra*, 416 U.S. at 152-154; *Matthews* v. *Eldridge*, 424 U.S. 319, 332-335 (1976); *Bishop* v. *Wood*, 426 U.S. 341 (1976).

Before an individual can be finally deprived of a property interest, due process requires some form of hearing, an opportunity to join issue, and an opportunity to present evidence to a decision maker who is then obliged to make a reasoned determination on the basis of the submission. *Matthews* v. *Eldridge, supra*. These due process requirements are precisely the rights that the Government granted its employees under the provisions of § 771.116(g) and (h) of the federal employee grievance system. Subsection (g) mandates that the grievance examiner upon completion of his inquiry "shall make the grievance file available to the employee and his representative for review and comment." The comments of the employee and his representative, if any, are to be included in the file. Subsection (h) provides that only *after* the employee and his representative have been afforded the right of review and comment provided for in subsection (g) is the examiner to "prepare a report of his findings and recommendations and submit the report, with the file, to the deciding official."

It is undisputed here that the grievance examiner failed to make the grievance file available for review and comment despite repeated requests for an oppor-

tunity for petitioner and his counsel to review the file and make comments. Further, it is undisputed that the grievance examiner after making his ex-parte, limited investigation simply submitted his report and recommendation to the deciding official. As a consequence, petitioner was deprived of his right to notice; his right to an opportunity to be heard; and his right to a reasoned determination by the grievance examiner—each right guaranteed to petitioner by the agency's own regulations and the constitutional requirements of due process.

III.

The district court's opinion, as affirmed, recognized that petitioner had a property interest protected by procedural due process, but concluded that the government's "deviations" from the required agency procedures were "minor" and "did not adversely affect" petitioner.[9] Appendix at 5a. This conclusion constitutes egregious constitutional error.

The "deviations" at issue went to the heart of the protections provided petitioner—and other federal employees—by 5 C.F.R. 771, that is, the right to notice; the right to assistance of counsel, and the right to be heard by the grievance examiner *before* the preparation of the report and recommended disposition of the grievance. The denial of these basic

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[9] Although the district court stated that it had examined the entire grievance file and the regulations governing the grievance procedure, the court at no place in its opinion sets forth its perception of what "deviations" from the required procedures actually occurred. Nor does the court offer any reasoned explanation to support its conclusion that such deviations were "minor" and "did not adversely affect petitioner."

rights, coupled with the grievance examiner's conclusion that petitioner could be transferred without explanation, made a mockery of the entire grievance proceeding and rendered it a nullity. The effect of the "deviations" was to take away from petitioner the oportunity clearly provided for in 5 C.F.R. 771 to question the propriety of the lateral transfer coming so late in his career.

It simply cannot be said that this loss of guaranteed procedural rights did not "adversely affect" petitioner. Had petitioner been afforded the protection of 5 C.F.R. 771 and the agency grievance system, he and his counsel could have submitted to the grievance examiner (1) an affidavit from the Special Agent in Charge of the Newark field office concerning the needs of that office; (2) evidence that petitioner was being replaced in the Miami office by much younger Spanish speaking agents, one of whom was being transferred from Puerto Rico and desired an assignment to the Newark field office; (3) information on the customs, policies and actual practices of the Secret Service in connection with transfers of senior agents; (4) information on the written transfer policy of the Secret Service; (5) legal argument and documentary evidence to sustain the position that the examiner was required to make an investigation as to why petitioner was being transferred; and (6) legal argument and documentary evidence to support a claim that the circumstances of petitioner's grievance required the examiner to exercise his discretion and grant some type of a hearing in order to make appropriate findings of fact. Any one of the foregoing steps could have had a substantial and material effect on the outcome of the proceeding and the final agency decision.

Finally, the district court's opinion cuts against the federal interest. Neither the statutory mission of the Secret Service nor the overall purpose of sound federal employer-employee relations, as evidenced by 5 C.F.R. Part 771, is furthered by a patently unfair and unlawful proceeding which deprives a career federal employee of his most precious rights. To the extent that one citizen's constitutionally protected rights are taken without due process of law, the rights of all members of the citizenry are surely diminished.

CONCLUSION

For all of these reasons, a writ of certiorari should issue to review the judgment and order of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 79-3359

No. 84-1156

LOUIS R. CRUZ,
Appellant

v.

H. S. KNIGHT, Director
U.S. Secret Service

[Filed Jan. 9, 1981]

Appeal from the United States District Court
for the District of Columbia

Before: TAMM and MIKVA, Circuit Judges, and NICHOLS *, Judge, United States Court of Claims

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3359

LOUIS R. CRUZ,

Plaintiff,

v.

H. S. KNIGHT,

Defendant.

[Filed Feb. 5, 1980]

ORDER OF DISMISSAL

Louis R. Cruz, a permanent employee and Special Agent with the United States Secret Service, challenges his transfer from Miami, Florida to the Newark, N.J. office of the agency. Plaintiff is of Puerto Rican ancestry and has served in the Miami office for more than 12 years. The agency's support for and asserts as reasons for the transfer, Cruz's fluency in Spanish and the presence of a large Spanish-speaking population in the Newark, N.J. area. The plaintiff instituted informal and later formal grievance proceedings as required by relevant regulations. A grievance examiner issued findings and recommendations supporting the proposed transfer which were later accepted by the Deputy Director of the Secret Service. He then filed a second informal and formal grievance complaining of errors in the initial proceeding. They were rejected.

The matter came before the Court upon plaintiff's motion for a preliminary injunction and defendant's motion to dismiss. After a consideration of the memoranda, legal authorities submitted on behalf of the parties, and oral argument of counsel, the Court finds as follows:

To the extent the complaint alleges that currently the subject matter jurisdiction of this court results from plaintiff's claim that the transfer was either an "adverse action" or an act of illegal discrimination in violation of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, the complaint fails to state a claim upon which relief can be granted and the Court lacks subject matter jurisdiction. With respect to the "adverse action," plaintiff has failed to exhaust his administrative remedies before the Merit Systems Protection Board (MSPB) and even after such exhaustion, this Court would not have jurisdiction to review the MSPB decision. *See* 5 U.S.C. § 7703(b)(1) (Supp. 1979) and *Kyle* v. *Interstate Commerce Commission*, —— U.S. App. D.C. ——, —— F.2d ——. App. No. 79-1307 (decided October 26, 1979), *per curiam*, slip op. at p. 2. With respect to the alleged unlawful discrimination, plaintiff has failed to exhaust his administrative remedies set forth in 29 C.F.R. § 16.01 *et seq.* as is required under *Brown* v. *General Services Administration*, 425 U.S. 820 (1976). The Court notes that in oral argument, plaintiff agreed that, to the extent that his claims were based on discrimination and adverse action, the complaint was dismissable because of his failure to exhaust his administrative remedies as specified above.

To the extent plaintiff seeks review of his grievance on the proposed transfer to the Newark office this Court has subject matter jurisdiction since plaintiff has exhausted his available administrative remedies. However, the complaint fails to state a claim upon which relief can be granted on plaintiff's challenge to the grieved transfer for the following reasons: (a) As to plaintiff's procedural challenge to the grievance proceeding, the Court, having examined the

entire grievance file and the regulations governing the grievance procedure, concludes that the proceeding conducted by the grievance examiner substantially complied with due process and with the procedures set forth in the Federal Personnel Manual, Chapter 771, 1-16 to 1-20, *see Arnett* v. *Kennedy*, 416 U.S. 134 (1974), and that any minor deviations from the required procedures which might have occurred did not adversely affect plaintiff. (b) As to the substance of the transfer, it is clear to the Court that defendant has ample authority to transfer plaintiff, *see* 5 C.F.R. Part 335; 18 U.S.C. § 3056, and that the transfer was for the "efficiency of the service" because it was designed to use plaintiff's experience and special skills in a manner thought most useful by management. The specific reason for the transfer was communicated to plaintiff and his attorney in the final decision on the grievance.

The plaintiff can prove no set of facts which would entitle him to the injunctive relief requested, and his claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See Conley* v. *Gibson*, 355 U.S. 41 (1957), and *Barr* v. *District of Columbia*, 202 F. Supp. 260 (D.D.C. 1962).

In view of the foregoing the Court concludes, it is unlikely that plaintiff would prevail on the merits of his underlying complaint. Nor can plaintiff demonstrate irreparable injury of the quality and quantity necessary to justify the issuance of preliminary injunctive relief in federal personnel cases. *See Sampson* v. *Murray*, 415 U.S. 61 (1974); *Conway* v. *Andrus, et al.*, App. No. 79-1003 (D.C. Cir. June 21, 1979); *Wallace* v. *Lynn*, 507 F.2d 1186 (D.C. Cir. 1974), *see also Arnett* v. *Kennedy*, 416 U.S. 134

(1974). The public interest and a balancing of the equities here involved weigh in favor of permitting the transfer of agents of the Secret Service at that agency's option, *see Sampson* v. *Murray, supra,* and the Court concludes that plaintiff cannot meet the standards for the issuance of preliminary injunctive relief. *See Virginia Petroleum Jobbers Assoc* v. *Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958), and *WMATA* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

Finally, the Court notes two recent decisions involving personnel transfers, *Martin R. Conway* v. *Cecil Andrus, et al., supra* and *Joel D. Webb* v. *W. Michael Blumenthal,* Civil Action No. 79-1449 (D.C. C. June 1, 1979) support the result reached in the present case.

For the reasons stated above, it is this 5th day of February, 1980,

ORDERED that plaintiff's motion for preliminary injunctive relief is denied; that defendant's motion to dismiss is granted; and the case is dismissed with prejudice.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

GRIEVANCE REGULATIONS

5 C.F.R. Part 771 provides:

§ 771.101 Purpose.

This part sets forth the regulations under which each agency shall establish an agency grievance system.

§ 771.102 Definitions.

In this part:

(a) Days means calendar days.

(b) Employee includes a former employee of an agency.

(c) Examiner means a person utilized by an agency to conduct an inquiry, and, when necessary, hold a hearing on a grievance.

(d) Grievance means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction which is subject to the control of agency management.

COVERAGE

§ 771.103 Agency coverage.

(a) *Agencies covered.* Except as provided in paragraph (b) of this section, this part applies to the executive agencies and military departments as defined by section 105 and 102 of title 5, United States Code, and to those portions of the legislative and judicial branches and of the government of the District of Co-

lumbia having positions in the competitive service.

(b) *Agencies not covered.* This part does not apply to the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Energy Research and Development Administration, the Nuclear Regulatory Commission, the Tennessee Valley Authority, and the U.S. Postal Service.

[39 FR 32542, Sept. 9, 1974, as amended at 42 FR 28516, June 3, 1977]

§ 771.104 Establishment and publication.

(a) Each agency shall establish and administer an agency grievance system in accordance with this part.

(b) In the development of its grievance system, each agency shall give its employees an opportunity to express their views and shall consult or negotiate with recognized labor organizations as required under the form of recognition held.

(c) Each agency shall publish the provisions of its grievance system; make copies available to employees, their representatives, veterans organizations, and recognized labor organizations; and notify employees where copies are available for review.

§ 771.105 Presentation of grievance.

(a) An employee, in presenting a grievance under an agency grievance system, shall:

(1) Be assured freedom from restraint, interference, coercion, discrimination, or reprisal;

(2) Have the right to be accompanied, represented, and advised by a representative of his own choosing; and

(3) Be assured a reasonable amount of official time if he is otherwise in an active duty status.

(b) When an employee designates another employee of the agency as his representative, the representative, in presenting a grievance under an agency grievance system shall:

(1) Be assured freedom from restraint, interference, coercion, discrimination, or reprisal; and

(2) Be assured a reasonable amount of official time if he is otherwise in an active duty status.

(c) The agency shall have the right:

(1) To disallow the employee's choice of another agency employee as his/her representative if that choice conflicts with priority needs of the Government or would give rise to unreasonable costs to the Government; and

(2) To disallow any selection the employee makes with regard to a representative on the grounds of conflict of interest or conflict of position.

(d) The employee shall have the right to challenge the decision to disallow his/her

choice of representative to the head of the agency or a person the head of the agency has designated and obtain a decision before proceeding with a grievance, in accordance with procedures described in the agency grievance system. The decision of the head of the agency or his/her designee will be made no later than 10 days after receipt of the employee challenge unless another reasonable time limit is specified in the agency grievance system. The decision will be final.

[39 FR 32542, Sept. 9, 1974, as amended at 41 FR 48110, Nov. 2, 1976]

§ 771.106 Allegations of unfair labor practices.

(a) An allegation of an unfair labor practice made in connection with a grievance under this part shall be incorporated in the grievance and processed under this part; however, the decision on the grievance may not be construed as an unfair labor practice decision under Executive Order 11491, as amended.

(b) If an allegation of an unfair labor practice made in connection with a grievance under this part has already been filed with the Assistant Secretary of Labor, the grievance may not be processed under this part.

§ 771.107 Employee coverage.

(a) *Employees covered.* Except as provided in paragraph (b) of this section, this subpart applies to all employees of an agency.

(b) *Employees not covered.* This subpart does not apply to:

(1) A noncitizen appointed under Civil Service Rule VIII, § 8.3 of this chapter.

(2) An alien appointed under section 1471 (5) of title 22, United States Code;

(3) A nonappropriated-fund employee as defined in section 2105(c) of title 5 or section 4205(5) of title 38, United States Code;

(4) A physician, dentist, or nurse appointed under chapter 73 of title 38, United States Code;

(5) A Foreign Service officer, Foreign Service Reserve officer, Foreign Service Information officer, and staff officers and employees appointed under chapter 14, chapter 14A, or chapter 32 of title 22, United States Code; and

(6) An employee otherwise included under paragraph (a) of this section when he is a member of a class of employees excluded from coverage by the Commission on the recommendation of the head of the agency concerned.

§ 771.108 Grievance coverage.

(a) Except as provided in paragraphs (b) and (c) of this section, this subpart applies to any matter of concern or dissatisfaction to an employee which is subject to the control of agency management or any matter in which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her.

(b) This subpart does not apply to:

(1) A matter which is subject to final administrative review outside the agency under law or the regulations of the Commission;

(2) The content of published agency policy;

(3) Nonselection for promotion from a group of properly ranked and certified candidates;

(4) A grievance covered by procedures established by an agreement negotiated under section 11 of Executive Order 11491, as amended;

(5) An action terminating a temporary promotion within a maximum period of 2 years and returning the employee to position from which he was temporarily promoted or reassigning or demoting him to a different position that is not at a lower grade or level than the position from which he was temporarily promoted;

(6) Nonadoption of a suggestion or disapproval of a quality salary increase, performance award, or other kind of honorary or discretionary award; or,

(7) A preliminary warning or notice of an action which, if effected, would be covered under the grievance system or excluded from coverage under paragraph (b) (1) of this section.

(c) This subpart does not apply to a separation action. However, an agency may ex-

tent the coverage of its grievance system to any aspect of a separation action that is not subject to final administrative review outside the agency under law or the regulations of the Commission.

[39 FR 32542, Sept. 9, 1974, as amended at 41 FR 22550, June 4, 1976; 41 FR 30320, July 23, 1976; 41 FR 46866, Oct. 26, 1976]

THE GRIEVANCE

§ 771.109 Right to present grievance.

(a) An employee is entitled to present a grievance under the agency grievance system. The agency shall accept and process a properly presented grievance in accordance with its grievance system except that an allegation of discrimination made in connection with a grievance shall be processed under Part 713 of this chapter.

(b) An employee, in presenting his grievance, is entitled to communicate with and seek advice from:

(1) His servicing personnel office;

(2) The Director of Equal Employment Opportunity of the agency or an Equal Employment Opportunity Officer or Counselor designated under Part 713 of this chapter;

(3) The counselor of the agency, or his deputy, designated under Part 735 of this chapter; and

(4) A supervisory or management official of higher rank than the employee's immediate supervisor.

§ 77.110 Avoidance of delay.

(a) An agency shall give each grievance full, impartial, and prompt consideration and shall require that the decision on a grievance be issued within 90 days after initiation of the informal procedure established under § 771.112.

(b) To insure orderly processing, an agency shall establish time limits for:

(1) Completion of action under the informal procedure;

(2) Filing a grievance under the formal procedure after completion of action under the informal procedure;

(3) Adjustment or referral of the grievance under § 771.116(b);

(4) Completion of the examiner's inquiry; and

(5) Issuance of the decision after completion of the examiner's inquiry.

[39 FR 32542, Sept. 9, 1974, as amended at 42 FR 28516, June 3, 1977]

§ 771.111 Cancellation of grievance.

An agency shall cancel a grievance:

(a) At the employee's request;

(b) Upon termination of the employee's employment with the agency unless the per-

sonal relief sought by the employee may be granted after termination of his employment;

(c) Upon the death of the employee unless the grievance involves a question of pay; or

(d) For failure to prosecute if the employee does not furnish required information and duly proceed with the advancement of his grievance.

INFORMAL GRIEVANCE PROCEDURE

§ 771.112 Establishment of informal procedure.

Each agency shall establish a procedure appropriate to its organization and delegations of authority for the informal adjustment of grievances.

§ 771.113 Presenting grievance under informal procedure.

(a) *Time limit.* (1) An employee may present a grievance concerning a continuing practice or condition at any time.

(2) An employee shall present a grievance concerning a particular act or occurrence within 15 days of the date of that act or occurrence or the date he became aware of that act or occurrence. The agency may extend the time limit in this subparagraph for good cause shown by the employee.

(b) *Form of grievance.* An employee may present a grievance under the informal procedure either orally or in writing.

§ 771.114 Mandatory use of informal procedure.

Each agency shall require that an employee complete action under the informal procedure before a grievance concerning the same matter will be accepted from him for processing under the formal procedure.

FORMAL GRIEVANCE PROCEDURE

§ 771.115 Presenting grievance under formal procedure.

(a) An employee is entitled to present a grievance under the formal procedure if he (1) has completed action under the informal procedure and (2) presents the grievance within the time limit established by the agency under § 771.110(b)(2).

(b) The grievance shall (1) be in writing, (2) contain sufficient detail to identify and clarify the basis for the grievance, and (3) specify the personal relief requested by the employee.

§ 771.116 Processing grievance under formal procedure.

(a) The grievance shall be referred to a deciding official at a level of management designated by the agency. The deciding official shall be at a higher administrative level than any official who could have adjusted the grievance under the informal procedure.

(b) The deciding official shall attempt to resolve the grievance. If he cannot resolve the

grievance in a manner acceptable to the employee, he shall refer the grievance for inquiry by an examiner.

(c) An examiner who meets the standards of experience and training prescribed by the Commission shall conduct an inquiry on a grievance referred under paragraph (b) of this section. The agency shall provide a method for selecting an examiner who (1) is fair, impartial, and objective, and (2) does not occupy a position which is, directly or indirectly, under the jurisdiction of an official involved in the grievance or the deciding official, except when such an official is the head of the agency. If an agency desires to use an examiner from another agency, the agency shall make the arrangements. When these arrangements are made, the examiner is on a reimbursable detail to the requesting agency.

(d) The examiner shall conduct an inquiry of a nature and scope appropriate to the issues involved in the grievance. At the examiner's discretion, the inquiry may consist of:

(1) The securing of documentary evidence;

(2) Personal interviews;

(3) A group meeting;

(4) A hearing; or

(5) Any combination of paragraphs (d) (1) through (4) of this section.

(e) If a group meeting or hearing is held, a labor organization which holds exclusive rec-

ognition for the unit where the employee is located shall be given an opportunity to be represented.

(f) If a hearing is held the examiner shall conduct the hearing to conform with the following. (1) Except as provided in paragraph (e) of this section attendance at a hearing is limited to persons determined by the examiner to have a direct connection with the grievance.

(2) The hearing is conducted so as to bring out pertinent facts, including the production of pertinent records.

(3) Rules of evidence are not applied strictly, but the examiner shall exclude irrelevant or unduly repetitious testimony.

(4) Decisions on the admissibility of evidence or testimony are made by the examiner.

(5) Testimony is under oath or affirmation.

(6) The examiner shall give the parties opportunity to cross-examine witnesses who appear and testify.

(7) The examiner may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(8) Both parties are entitled to produce witnesses.

(9) The agency shall make its employees available as witnesses before an examiner when requested by the examiner after consideration of a request by the employee or the agency.

(10) If the agency determines that it is not administratively practicable to comply with the request of the examiner, it shall notify him in writing of the reasons for that determination. If, in the examiner's judgment, compliance with his request is essential to a full and fair hearing, he may postpone the hearing until such time as the agency complies with his request.

(11) Employees of the agency are in a duty status during the time they are made available as witnesses.

(12) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(13) The examiner, in his discretion, shall determine how the hearing shall be reported and shall have a verbatim transcript or written summary of the hearing prepared, including all pertinent documents submitted to and accepted by him. When the hearing is reported verbatim, the examiner shall make the transcript a part of the record of the proceedings. When the hearing is not reported verbatim, a suitable summary of the pertinent testimony shall be made. When agreed to in writing by the parties, the summary constitutes the report of the hearing and is made a part of the record of the proceedings. If the examiner and the parties fail to agree on the summary, the parties are entitled to submit written exceptions to any part of the summary, and those

written exceptions and the summary constitute the report of the hearing and are made a part of the record of the proceedings.

(g) The examiner shall establish a grievance file containing all documents related to the grievance, including statements of witnesses, records or copies thereof, and the report of the hearing when a hearing was held. On completion of his inquiry, the examiner shall make the grievance file available to the employee and his representative for review and comment. Their comments, if any, shall be included in the file.

(h) After the employee and his representative have been given an opportunity to review the grievance file, the examiner shall prepare a report of his findings and recommendations and submit that report, with the grievance file, to the deciding official. The examiner shall also furnish the employee and his representative a copy of the report.

(i) The deciding official shall accept the examiner's recommendations and issue the decision on the grievances, except that:

(1) If the head of the agency is the deciding official, he shall consider the grievance file and make the decision on the basis thereof.

(2) If the deciding official decides to grant the relief sought by the employee, he shall issue the decision accordingly without regard to the examiner's recommendations.

(3) If the deciding official determines that the examiner's recommendations are unacceptable, he shall transmit the grievance file with a specific statement of the basis for that determination to a higher level of authority, designated by the agency, for decision. The deciding official shall also furnish the employee and his representative a copy of that statement.

(j) The decision on the grievance shall be in writing and shall contain findings on all issues covered by the examiner's inquiry.

NEGOTIATED GRIEVANCE SYSTEMS

§ 771.117 Negotiated grievance systems.

This subpart does not apply to a grievance system established through a negotiated agreement between an agency and a labor organization to which exclusive recognition has been granted.

COMMISSION ACTION

§ 771.118 Employee requests for review.

The Commission does not act on a request by an employee for a review of an agency's action under an agency grievance system.

§ 771.119 Review of grievance systems.

The Commission reviews agency grievance systems through its inspection activity. When it finds that a system or operations thereunder do not conform with the requirements of this part, the Commission requires corrective action to bring the system or operations into conformity.

UNITED STATES GOVERNMENT

U. S. SECRET SERVICE

Memorandum 230.4

FROM: Director March 4, 1976

TO: All Special Agents in Charge

FROM: Director

SUBJECT: Policy Statement on Career Development, Transfers and Reassignment

Reference is made to the previous memoranda on this subject, same file number.

Attached is the plan for GS-1811 employees of the United States Secret Service. This transmittal memorandum is introductory and explanatory and will be considered a part of the plan.

This plan is general in nature and is intended as a guideline for all 1811's. In today's sophisticated and complex bureaucracy with constantly changing workload, obligations, requirements and duties there is *no* plan which can be specific and rigid. The answer is guidelines and general policy statements.

This plan should be a useful tool, not only for Special Agents, but also for supervisors and managers who can refer to it for both immediate and long range planning.

This plan cannot and will not satisfy the needs of *everyone*. It will however be beneficial to the great majority of 1811's.

A quick reading of the plan will reveal several important policy decisions:

1. A newly hired agent will be permanently transferred between his second and fifth year of employment.
2. While still at the journeyman level (GS-12) he may be again permanently transferred.
3. Additional permanent transfers may be made according to the needs of the Service.
4. To be considered for promotion into the GS-13 level and/or supervisory/manager level it is *not* necessary to have been permanently assigned to a permanent protective detail. Given the present numbers of Special Agents and the *relatively* few permanent protective and allied positions it is no longer numerically possible for *every* agent to serve in that capacity.

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ALEXANDER L. STEVAS

No. 80-1477

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS R. CRUZ, PETITIONER

v.

H. S. KNIGHT, DIRECTOR,
UNITED STATES SECRET SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a Secret Service agent, contends that the Service's decision to transfer him from Miami to Newark deprived him of property without due process of law.

1. Petitioner is a GS-13 Special Agent in the United States Secret Service who has been assigned to the Service's Miami, Florida, office since 1966 (Complaint 1, 3). On May 2, 1979, petitioner received notification that the Service intended to transfer him to its office in Newark, New Jersey (C.A. App. 38a).[1] One week later, petitioner requested that the transfer be cancelled for the convenience of his family (C.A. App. 39a-40a). This request was denied with the explanation that transfers and reallocations of resources

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[1] "C.A. App." refers to petitioner's appendix in the court of appeals.

are necessary in order to carry out the function of the Secret Service and that family convenience could not be permitted to become a decisive factor in transfer decisions (C.A. App. 41a-42a).

Thereafter, petitioner instituted formal grievance proceedings to challenge his transfer (C.A. App. 43a-45a). In response to petitioner's grievance, the Acting Deputy Director of the Secret Service noted that Section 133.23 of the Secret Service Manual provides that "all employees must be ready to accept assignments anywhere within the territorial jurisdiction covered by this Service," and concluded that the transfer was justified for the needs of the Service (C.A. App. 46a). At petitioner's request, a grievance examiner was designated to review the case (C.A. App. 54a).

On September 11, 1979, following his inquiry into the matter, the grievance examiner recommended that the transfer order be sustained (C.A. App. 56a-58a). On September 14, 1979, petitioner, through counsel, submitted comments to the Deputy Director opposing the examiner's recommendation (C.A. App. 68a-70a). On October 1, 1979, after consideration of the entire grievance file and petitioner's comments, the Deputy Director sustained the transfer order (C.A. App. 71a). In his decision, the Deputy Director explained that, because of the heavy concentration of Hispanics in the Northern New Jersey area, the needs of the Service required assignment of a Spanish-speaking special agent to the Newark office.

On October 19, 1979, petitioner instituted a second grievance, claiming that the Service had failed to comply with its grievance procedures in handling his first grievance (C.A. App. 72a-74a). This grievance was also denied (Complaint 9, Exh. 4).

2. Petitioner then filed this action in the United States District Court for the District of Columbia seeking declara-

tory and injunctive relief. Petitioner argued that he had been denied due process because of various procedural defects in the processing of his grievance. The district court granted the government's motion to dismiss the action (Pet. App. 3a-6a). After examining the entire grievance file and the regulations governing grievance procedures, the court concluded that the grievance examiner had substantially complied with the regulatory procedures and that "any minor deviations from the required procedures which might have occured did not adversely affect [petitioner]" (*id.* at 5a). The court also concluded that the Service had ample authority to transfer petitioner and that "the transfer was for the 'efficiency of the service' because it was designed to use [petitioner's] experience and special skills in a manner thought most useful by management" (*ibid.*). The court of appeals affirmed without opinion (Pet. App. 1a-2a).

3. The decision of the court of appeals, affirming the district court's order, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's essentially fact-bound claim is therefore not warranted.

Federal agencies have broad discretion in transferring personnel to a different locality, and judicial review of such discretionary decisions, if it exists at all, is narrowly circumscribed. See, *e.g.*, *Bullard* v. *Webster*, 623 F. 2d 1042 (5th Cir. 1980), petition for cert. pending, No. 80-1228 (filed Jan. 19, 1981); *Leefer* v. *Administrator, NASA*, 543 F. 2d 209 (D.C. Cir. 1976); *Kletschka* v. *Driver*, 411 F. 2d 436 (2d Cir. 1969).[2] The Deputy Director of the Secret Service specifically found that the need for a Spanish-speaking agent in the Newark office justified the transfer. Petitioner,

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[2]A transfer decision is not an "adverse action" to which statutory procedural protections apply. See 5 U.S.C. (Supp. III) 7511-7513; *Leefer* v. *Administrator, NASA*, *supra*, 543 F. 2d at 213.

in apparent recognition of the agency's discretion to determine the needs of the Service, does not directly challenge this determination. Rather, he contends (Pet. 12-13) that a Secret Service memorandum concerning transfers and reassignments created a constitutionally protected property interest of which petitioner was deprived by the transfer. However, this memorandum simply states that permanent transfers of employees classified above GS-12 "may be made according to the needs of the Service" (Pet. App. 23a). Furthermore, Section 133.23 of the Secret Service Manual specifically provides that "all employees must be ready to accept assignments anywhere within the territorial jurisdiction covered by this Service" (see C.A. App. 46a). The memorandum on which petitioner relies thus did not create a property entitlement to be assigned to any particular location. Hence, petitioner's reassignment did not deprive him of any property interest. See *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

In any event, even assuming that petitioner had a property entitlement in remaining at the location to which he was assigned, the procedural protections that petitioner received afforded him whatever process was due. Petitioner pursued informal and formal grievance procedures. The record reflects that prior to filing his formal grievance, petitioner was informed that his reassignment was for the purpose of utilizing his skills as an agent in a way most advantageous to the Secret Service (C.A. App. 41a-42a). A grievance examiner from outside the Secret Service was appointed to review the case. Prior to the final decision, petitioner was afforded an opportunity to present, with the assistance of counsel, a written response to the grievance examiner's findings and recommendation. The final decision denying petitioner's grievance was made after consideration of the grievance examiner's report and petitioner's comments, and was based on the conclusion that the transfer was justified by the needs of the Service. Given the

discretionary nature of transfer decisions and the limited nature of the deprivation, if any, that may be created by such decisions, this grievance procedure was sufficient to satisfy the requirements of due process. See *Mathews* v. *Eldridge*, 424 U.S. 319, 332-335, 341-349 (1976); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 894-895 (1961).

Petitioner further contends (Pet. 15-17) that he was adversely affected by the Service's deviations from grievance procedure regulations. This argument is without merit. The grievance procedure regulations in effect at the time of petitioner's grievance provided that the grievance inquiry should be of a nature and scope appropriate to the issue involved and that the decision whether to conduct a hearing was a matter within the discretion of the grievance examiner (5 C.F.R. 771.116(d) (1979); Pet. App. 17a).[3] Thus, the failure to afford petitioner a hearing was not a "deviation" from the regulations.

Petitioner complains, however, that the grievance examiner failed to make the grievance file available to petitioner for review and comment before preparing his findings and recommendation on the grievance, as required by 5 C.F.R. 771.116(g) and (h) (1979) (Pet. App. 20a).[4] But even if petitioner and his attorney did not have an opportunity to review and comment on the grievance file prior to the examiner's recommendation, the record clearly shows that

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[3]Current regulations state that agency grievance procedures must provide for fact-finding, when appropriate, and "shall include a hearing when one is suitable to ascertain the circumstances concerning the grievance." 5 C.F.R. 771.302(b).

[4]This issue is not likely to arise with any frequency because the current regulations do not require a two-tiered system of review. See 5 C.F.R. 771.302(f)(2) (providing that the decision on an employee grievance may be made by "[t]he official(s) designated to determine the disputed facts").

they had that opportunity prior to the Service's final decision on the grievance. The Deputy Director's final decision was rendered after a thorough review of the grievance file and after consideration of information presented by petitioner's attorney. As the district court concluded (Pet. App. 5a), petitioner was not prejudiced by any minor deviations from the required grievance procedures.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

DOJ-1981-04

No.
80-1477

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LOUIS R. CRUZ,

Petitioner,

v.

H.S. KNIGHT, Director,
United States Secret Service,

Respondent.

AMICUS CURIAE BRIEF
of
FEDERAL CRIMINAL INVESTIGATORS ASSOCIATION

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QUESTIONS PRESENTED

Whether the petitioner, an employee of the United States Government, may be denied such grievance procedures as are provided by statute, denying him the statutory rights of a represenative of his choosing and the statutory requirement of decision and review; is the denial to petitioner of such statutory rights sufficient to state a claim upon which relief can be granted.

PARTIES BELOW

The parties to the appeal below were:

Appellant, Louis R. Cruz

Appellee, H.S. Knight, Director, United States Secret Service

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OPINIONS BELOW

None of the opinions and judgments delivered in the courts below were reported. The Court of Appeals judgment is set forth in the Appendix page 1A. The opinion of the District Court is set forth in the Appendix at page 3A.

JURISDICTION

The jurisdiction of the court is invoked under 28 U.S.C. § 1254 (1).

This brief is an amicus curiae brief filed within the time for filing the brief in opposition to the petition for certiorari. Written consent has been obtained from all parties to the case.

REGULATORY PROVISIONS INVOLVED

The relevant sections of 5 C.F.R. Part 771, setting forth regulations which the case involves are set forth in the Appendix at page 7A.

STATEMENT OF THE CASE

The petitioner herein is a Secret Service Special Agent career officer for the past fifteen years. This agent in reliance on the rules of his department established firm family roots with his wife and five children in Miami, Florida. On May 2, 1979, the petitioner was notified that he would be transferred to a station in Newark, New Jersey, which transfer was to commence on July 29, 1979.

At the time of notification of his transfer the petitioner had already completed thirteen years as a Special Agent and more than ten years prior had purchased the family home in Miami, Florida, by virtue of the department's rules which could make subsequent permanent transfers only on the basis of the needs of the service. The written rules of the

Director of Secret Service provided in formalized form that transfers would be made according to three basic catagories:

1. For newly hired agents permanent transfers could be made between the 2nd and 5th years of employment.

2. While still at journeyman level (G.S.-12) the agent could then be permanently transferred and,

3. Additional permanent transfer could be made on the basis of the needs of the service.

The petitioner at the time of notification of his transfer had already in excess of five years employment (over thirteen years), was beyond journeyman level (over G.S.12, i.e.G.S. 13), and because of his background was advised of his exceptional suitability and need for

the Miami, Florida area station.*

The petitioner in writing by memorandum requested pursuant to the Secret Service grievance system an opportunity to be provided with the reasons for his projected transfer. The Secret Service grievance system provides in part: It is the policy of the U.S. Secret Service to afford its employees a simple, orderly method of obtaining due consideration of their dissatisfaction with matters affecting them personally that are subject to management control. Employee grievances shall receive impartial consideration and shall be settled as close to their source,

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* The petitioner was on many occasions the recipient of various awards, citations and accommodations while at the Miami, Florida station. The petitioner is fluently conversant in the Spanish language and had been advised by the Department of his unique need in the Miami, Florida office. He has been advised that the position which he would vacate would be

as promptly and as fairly as possible, All employees will have access to this procedure. Personnel Policy Manual (hereinafter "PPM") Chapter 12, I.

The first memorandum of petitioner was not recognized by the personnal division as a formal grievance and thus on that same day the petitioner filed a formal grievance, dated May 23, 1979. The subsequent transfer of petitioner was postponed pending the resolution of the formal grievance. During the formal grievance proceedings the officer conducting the inquiry declined to abide by the provisions of 5 C.F.R. 771. The provisions of that section, identical to the Treasury Personnel Manual, Chapter 771, provide that "on completion of his inquiry the examiner should make the

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filled by a Spanish speaking agent from Puerto Rico. The petitioner likewise is of Puerto Rican ancestry.

grievance file available to the employee and his represenative for review and comment. Their comments, if any, shall be included in the file". Additionally the regulations as well as the manual provide that only after the employer and his represenative have been given an opportunity to review the grievance file will the examiner make a report as to findings and recommendations. Petitioner's counsel maintains his request to represent the petitioner but that such request was ignored by the Services' examiner and that the entire grievance file and its documents were not made available to counsel as required by the regulations in order for the petitioner to present the "review and comment" provided for by the regulations.**

** The petitioner alleges that the examiner concluded that a permanent

The final agency decision made on October 1, 1979, adopted the examiner's recommendation to transfer the petitioner and petitioner had thus exhausted his administrative remedies. On December 14, 1979, petitioner filed a complaint for declaratory and injunctive relief in the District Court for the District of Columbia and such complaint was dismissed by District Court on February 5, 1980. On February 7, 1980, petitioner filed a notice of appeal with that court issuing a temporary stay continuing the stay until its decision affirming the District Court, and thereafter staying its mandate until March 2, 1981, to permit petitioner to

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transfer could be made "without explaination". The District Court in this decision concluded that "the specific reason for the transfer was communicated to plaintiff and his attorney in the final decision on the grievance".

file a petition for a writ of certiorari in this court.

SUMMARY OF ARGUMENT

(1)

The District Court should not have dismissed the complaint because sufficient facts in support of such claim was made which if proved entitles the plaintiff to the relief requested.

(2)

The statutory provisions of the grievance procedures were denied the plaintiff and thus denied the plaintiff his constitutionally protected rights as a public employee.

ARGUMENT

1. IT IS THE ACCEPTED RULE THAT A COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM UNLESS IT APPEARS BEYOND DOUBT THAT THE PLAINTIFF CAN PROVE NO SET OF FACTS IN SUPPORT OF HIS CLAIM WHICH WOULD ENTITLE HIM TO RELIEF. Conley v. Gibson, 355 U.S. 45.

The District Court accepted subject matter jurisdiction over petitioner's complaint which alleged a denial of his statutory rights and the regulations of the service. The District Court in so finding concluded that "any minor deviations" from required procedures which might have occurred did not adversely affect plaintiff. The District Court in noting "deviations" from the statutory required procedures in essence acknowledged allegations of facts in which petitioner alleges a wrong. That this wrong as

alleged in the complaint adversely affected plaintiff as he further alleges is a matter to be decided upon after the defendant can so show the court, given the liberal opportunity for discovery and other pre-trial procedures. Conley op. cit. 47. The court in Conley citing Leimer v. State Mutual Life Assur. Co., 108 F. 2d 302; Dioguardi v. Durning, 139 F. 2d 774; Continental Collieries v. Shober, 130 F. 2d 631, argued that if the plaintiffs' in that case proved wrongful discharge (in the instant case uprooting of family and consequent harm), their job was not protected by grievance procedures, because in that case they were Negroes aggrieved, and their complaint should not be dismissed. The Conley court indicated that certain agreements may be fair and impartial on their face yet administered in such a way as to be flagrantly discriminatory

against certain persons to the agreement. The complaint in the instant case makes exactly such allegations, by analogy, admittedly the instant case not being one of racial considerations. However, the principle of law enunciated by this court is applicable nevertheless.

This court has ruled in Sampson v. Murray, 415 U.S. 61 that the District Court does not have jurisdiction in matters such as the within case until it is said that the administrative decision (in that instance an employee discharge) fails to conform to the applicable regulations. Service v. Dulles 354 U.S. 363. The corollary of that decision in conformity with the discussion in Sampson relative to Dulles provides the District Court with jurisdiction to hear a matter upon the showing of the failure of the service to conform to applicable

regulations, indeed its own regulations inclusive. It is significant to note that the court's decision in Sampson (at page 71 footnote 22) upheld the Dulles plaintiff's position in deciding that his "dismissal cannot stand". 354 U.S., at 388. There as with the within case administrative review was exhausted and departmental regulations were not followed in effecting plaintiff's status.

ARGUMENT

2. THE STATUTORY PROVISIONS RELATING TO THE GRIEVANCE PROCEDURES OF THE CIVIL SERVICE PLAINTIFF MAY NOT BE ARBITRARILY DENIED AND WITH THE REGULATIONS THEREUNDER PROVIDE PROCEDURAL RIGHTS CONSTITUTIONALLY GUARANTEED TO PUBLIC EMPLOYEES.

This court has upheld the statutory procedural rights of public employees as constitutionally guaranteed. Board of Regents v. Roth, 408 U.S. 564 (1972). Perry v. Sinderman, 408 U.S. 593 (1972). The Grievance Regulations, 5 C.F.R. Part 771 provides the regulations under which the Secret Service among others shall establish an agency grievance system, § 771.101 and 771.103 (a) for its special agents (employees), § 771.102. The Grievance Regulations in section sequence are set forth on Appendix page 7A et seq.

They provide detailed procedures "for personal relief in a matter of concern or dissatisfaction which is subject to the control of agency management". In the instant case this relief was requested from the harmful effects of a permanent transfer under the control of the Secret Service agency management.

In Arnett v. Kennedy, 416 U.S. 134 this court upheld the constitutionality of a regulatory federal employees act (in that case specifically the Lloyd-La Follett Act, Codified as 5 U.S.C. 7501) similar in nature to the regulatory provisions of the within case, i.e. 5 C.F.R. Part 771. A concurring opinion in Arnett by Mr. Justice Powell joined by Mr. Justice Blackmum further stated that the employee in that case was entitled to notice and a full evidentiary hearing, even though the latter was discretionary

under the Act. Under § 771.116 of 5 C.F.R. Part 771 paragraph (d) the grievance examiner is given discretion among several options in the manner of conducting a mandatory inquiry. However, the examiner is mandated under Paragraph (g) to "establish a grievance file containing all documents related to the grievance, ... On completion of his inquiry, the examiner shall make the grievance file available to the employee and his representative for review and comment. Their comments, if any, shall be included in the file". (Emphasis supplied). These mandatory procedures were denied to the plaintiff special agent herein. Due process in its flexible application was thus denied to appellant. Cafeteria Workers v. McElroy 367 U.S. 895.

The appellant likewise timely made his

grievance and timely filed his complaint. Brown v. General Services Administration, 425 U.S. 820.

CONCLUSION

The writ of certiorari should be granted or summary reversal should be made of the judgment affirming the dismissal of plaintiff's complaint.

Respectfully submitted,

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Attorney for
Amicus Curiae

Federal Criminal
Investigators Association

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980

Civil Action No. 79-3359

No. 84-1156

LOUIS R. CRUZ,
Appellant

v.

H. S. KNIGHT, Director
U.S. Secret Service

[Filed Jan. 9, 1981]

Appeal from the United States District Court
for the District of Columbia

Before: TAMM and MIKVA, Circuit Judges, and NICHOLS *, Judge, United States Court of Claims

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an

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* Sitting by designation pursuant to 28 U.S.C. § 293(a).

opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

ON CONSIDERATION OF THE FOREGOING, It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam

For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3359

LOUIS R. CRUZ,

Plaintiff,

v.

H. S. KNIGHT,

Defendant.

[Filed Feb. 5, 1980]

ORDER OF DISMISSAL

Louis R. Cruz, a permanent employee and Special Agent with the United States Secret Service, challenges his transfer from Miami, Florida to the Newark, N.J. office of the agency. Plaintiff is of Puerto Rican ancestry and has served in the Miami office for more than 12 years. The agency's support for and asserts as reasons for the transfer, Cruz's fluency in Spanish and the presence of a large Spanish-speaking population in the Newark, N.J. area. The plaintiff instituted informal and later formal grievance proceedings as required by relevant regulations. A grievance examiner issued findings and recommendations supporting the proposed transfer which were later accepted by the Deputy Director of the Secret Service. He then filed a second informal and formal grievance complaining of errors in the initial proceeding. They were rejected.

The matter came before the Court upon plaintiff's motion for a preliminary injunction and defendant's motion to dismiss. After a consideration of the memoranda, legal authorities submitted on behalf of the parties, and oral argument of counsel, the Court finds as follows:

To the extent the complaint alleges that currently the subject matter jurisdiction of this court results from plaintiff's claim that the transfer was either an "adverse action" or an act of illegal discrimination in violation of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, the complaint fails to state a claim upon which relief can be granted and the Court lacks subject matter jurisdiction. With respect to the "adverse action," plaintiff has failed to exhaust his administrative remedies before the Merit Systems Protection Board (MSPB) and even after such exhaustion, this Court would not have jurisdiction to review the MSPB decision. *See* 5 U.S.C. § 7703(b)(1) (Supp. 1979) and *Kyle* v. *Interstate Commerce Commission*, —— U.S. App. D.C. ——, —— F.2d ——. App. No. 79-1307 (decided October 26, 1979), *per curiam*, slip op. at p. 2. With respect to the alleged unlawful discrimination, plaintiff has failed to exhaust his administrative remedies set forth in 29 C.F.R. § 16.01 *et seq.* as is required under *Brown* v. *General Services Administration*, 425 U.S. 820 (1976). The Court notes that in oral argument, plaintiff agreed that, to the extent that his claims were based on discrimination and adverse action, the complaint was dismissable because of his failure to exhaust his administrative remedies as specified above.

To the extent plaintiff seeks review of his grievance on the proposed transfer to the Newark office this Court has subject matter jurisdiction since plaintiff has exhausted his available administrative remedies. However, the complaint fails to state a claim upon which relief can be granted on plaintiff's challenge to the grieved transfer for the following reasons: (a) As to plaintiff's procedural challenge to the grievance proceeding, the Court, having examined the

entire grievance file and the regulations governing the grievance procedure, concludes that the proceeding conducted by the grievance examiner substantially complied with due process and with the procedures set forth in the Federal Personnel Manual, Chapter 771, 1-16 to 1-20, *see Arnett* v. *Kennedy*, 416 U.S. 134 (1974), and that any minor deviations from the required procedures which might have occurred did not adversely affect plaintiff. (b) As to the substance of the transfer, it is clear to the Court that defendant has ample authority to transfer plaintiff, *see* 5 C.F.R. Part 335; 18 U.S.C. § 3056, and that the transfer was for the "efficiency of the service" because it was designed to use plaintiff's experience and special skills in a manner thought most useful by management. The specific reason for the transfer was communicated to plaintiff and his attorney in the final decision on the grievance.

The plaintiff can prove no set of facts which would entitle him to the injunctive relief requested, and his claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). *See Conley* v. *Gibson*, 355 U.S. 41 (1957), and *Barr* v. *District of Columbia*, 202 F. Supp. 260 (D.D.C. 1962).

In view of the foregoing the Court concludes, it is unlikely that plaintiff would prevail on the merits of his underlying complaint. Nor can plaintiff demonstrate irreparable injury of the quality and quantity necessary to justify the issuance of preliminary injunctive relief in federal personnel cases. *See Sampson* v. *Murray*, 415 U.S. 61 (1974); *Conway* v. *Andrus, et al.*, App. No. 79-1003 (D.C. Cir. June 21, 1979); *Wallace* v. *Lynn*, 507 F.2d 1186 (D.C. Cir. 1974), *see also Arnett* v. *Kennedy*, 416 U.S. 134

(1974). The public interest and a balancing of the equities here involved weigh in favor of permitting the transfer of agents of the Secret Service at that agency's option, *see Sampson* v. *Murray*, *supra*, and the Court concludes that plaintiff cannot meet the standards for the issuance of preliminary injunctive relief. *See Virginia Petroleum Jobbers Assoc* v. *Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), and *WMATA* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

Finally, the Court notes two recent decisions involving personnel transfers, *Martin R. Conway* v. *Cecil Andrus, et al.*, *supra* and *Joel D. Webb* v. *W. Michael Blumenthal*, Civil Action No. 79-1449 (D.C. C. June 1, 1979) support the result reached in the present case.

For the reasons stated above, it is this 5th day of February, 1980,

ORDERED that plaintiff's motion for preliminary injunctive relief is denied; that defendant's motion to dismiss is granted; and the case is dismissed with prejudice.

/s/ Barrington D. Parker
BARRINGTON D. PARKER
United States District Judge

GRIEVANCE REGULATIONS

5 C.F.R. Part 771 provides:

§ 771.101 Purpose.

This part sets forth the regulations under which each agency shall establish an agency grievance system.

§ 771.102 Definitions.

In this part:

(a) Days means calendar days.

(b) Employee includes a former employee of an agency.

(c) Examiner means a person utilized by an agency to conduct an inquiry, and, when necessary, hold a hearing on a grievance.

(d) Grievance means a request by an employee, or by a group of employees acting as individuals, for personal relief in a matter of concern or dissatisfaction which is subject to the control of agency management.

COVERAGE

§ 771.103 Agency coverage.

(a) *Agencies covered.* Except as provided in paragraph (b) of this section, this part applies to the executive agencies and military departments as defined by section 105 and 102 of title 5, United States Code, and to those portions of the legislative and judicial branches and of the government of the District of Co-

lumbia having positions in the competitive service.

(b) *Agencies not covered.* This part does not apply to the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Energy Research and Development Administration, the Nuclear Regulatory Commission, the Tennessee Valley Authority, and the U.S. Postal Service.

[39 FR 32542, Sept. 9, 1974, as amended at 42 FR 28516, June 3, 1977]

§ 771.104 Establishment and publication.

(a) Each agency shall establish and administer an agency grievance system in accordance with this part.

(b) In the development of its grievance system, each agency shall give its employees an opportunity to express their views and shall consult or negotiate with recognized labor organizations as required under the form of recognition held.

(c) Each agency shall publish the provisions of its grievance system; make copies available to employees, their representatives, veterans organizations, and recognized labor organizations; and notify employees where copies are available for review.

§ 771.105 Presentation of grievance.

(a) An employee, in presenting a grievance under an agency grievance system, shall:

(1) Be assured freedom from restraint, interference, coercion, discrimination, or reprisal;

(2) Have the right to be accompanied, represented, and advised by a representative of his own choosing; and

(3) Be assured a reasonable amount of official time if he is otherwise in an active duty status.

(b) When an employee designates another employee of the agency as his representative, the representative, in presenting a grievance under an agency grievance system shall:

(1) Be assured freedom from restraint, interference, coercion, discrimination, or reprisal; and

(2) Be assured a reasonable amount of official time if he is otherwise in an active duty status.

(c) The agency shall have the right:

(1) To disallow the employee's choice of another agency employee as his/her representative if that choice conflicts with priority needs of the Government or would give rise to unreasonable costs to the Government; and

(2) To disallow any selection the employee makes with regard to a representative on the grounds of conflict of interest or conflict of position.

(d) The employee shall have the right to challenge the decision to disallow his/her

choice of representative to the head of the agency or a person the head of the agency has designated and obtain a decision before proceeding with a grievance, in accordance with procedures described in the agency grievance system. The decision of the head of the agency or his/her designee will be made no later than 10 days after receipt of the employee challenge unless another reasonable time limit is specified in the agency grievance system. The decision will be final.

[39 FR 32542, Sept. 9, 1974, as amended at 41 FR 48110, Nov. 2, 1976]

§ 771.106 Allegations of unfair labor practices.

(a) An allegation of an unfair labor practice made in connection with a grievance under this part shall be incorporated in the grievance and processed under this part; however, the decision on the grievance may not be construed as an unfair labor practice decision under Executive Order 11491, as amended.

(b) If an allegation of an unfair labor practice made in connection with a grievance under this part has already been filed with the Assistant Secretary of Labor, the grievance may not be processed under this part.

§ 771.107 Employee coverage.

(a) *Employees covered.* Except as provided in paragraph (b) of this section, this subpart applies to all employees of an agency.

(b) *Employees not covered.* This subpart does not apply to:

(1) A noncitizen appointed under Civil Service Rule VIII, § 8.3 of this chapter.

(2) An alien appointed under section 1471 (5) of title 22, United States Code;

(3) A nonappropriated-fund employee as defined in section 2105(c) of title 5 or section 4205(5) of title 38, United States Code;

(4) A physician, dentist, or nurse appointed under chapter 73 of title 38, United States Code;

(5) A Foreign Service officer, Foreign Service Reserve officer, Foreign Service Information officer, and staff officers and employees appointed under chapter 14, chapter 14A, or chapter 32 of title 22, United States Code; and

(6) An employee otherwise included under paragraph (a) of this section when he is a member of a class of employees excluded from coverage by the Commission on the recommendation of the head of the agency concerned.

§ 771.108 Grievance coverage.

(a) Except as provided in paragraphs (b) and (c) of this section, this subpart applies to any matter of concern or dissatisfaction to an employee which is subject to the control of agency management or any matter in which an employee alleges that coercion, reprisal, or retaliation has been practiced against him or her.

(b) This subpart does not apply to:

(1) A matter which is subject to final administrative review outside the agency under law or the regulations of the Commission;

(2) The content of published agency policy;

(3) Nonselection for promotion from a group of properly ranked and certified candidates;

(4) A grievance covered by procedures established by an agreement negotiated under section 11 of Executive Order 11491, as amended;

(5) An action terminating a temporary promotion within a maximum period of 2 years and returning the employee to position from which he was temporarily promoted or reassigning or demoting him to a different position that is not at a lower grade or level than the position from which he was temporarily promoted;

(6) Nonadoption of a suggestion or disapproval of a quality salary increase, performance award, or other kind of honorary or discretionary award; or,

(7) A preliminary warning or notice of an action which, if effected, would be covered under the grievance system or excluded from coverage under paragraph (b) (1) of this section.

(c) This subpart does not apply to a separation action. However, an agency may ex-

tent the coverage of its grievance system to any aspect of a separation action that is not subject to final administrative review outside the agency under law or the regulations of the Commission.

[39 FR 32542, Sept. 9, 1974, as amended at 41 FR 22550, June 4, 1976; 41 FR 30320, July 23, 1976; 41 FR 46866, Oct. 26, 1976]

THE GRIEVANCE

§ 771.109 Right to present grievance.

(a) An employee is entitled to present a grievance under the agency grievance system. The agency shall accept and process a properly presented grievance in accordance with its grievance system except that an allegation of discrimination made in connection with a grievance shall be processed under Part 713 of this chapter.

(b) An employee, in presenting his grievance, is entitled to communicate with and seek advice from:

(1) His servicing personnel office;

(2) The Director of Equal Employment Opportunity of the agency or an Equal Employment Opportunity Officer or Counselor designated under Part 713 of this chapter;

(3) The counselor of the agency, or his deputy, designated under Part 735 of this chapter; and

(4) A supervisory or management official of higher rank than the employee's immediate supervisor.

§ 77.110 Avoidance of delay.

(a) An agency shall give each grievance full, impartial, and prompt consideration and shall require that the decision on a grievance be issued within 90 days after initiation of the informal procedure established under § 771.112.

(b) To insure orderly processing, an agency shall establish time limits for:

(1) Completion of action under the informal procedure;

(2) Filing a grievance under the formal procedure after completion of action under the informal procedure;

(3) Adjustment or referral of the grievance under § 771.116(b);

(4) Completion of the examiner's inquiry; and

(5) Issuance of the decision after completion of the examiner's inquiry.

[39 FR 32542, Sept. 9, 1974, as amended at 42 FR 28516, June 3, 1977]

§ 771.111 Cancellation of grievance.

An agency shall cancel a grievance:

(a) At the employee's request;

(b) Upon termination of the employee's employment with the agency unless the per-

sonal relief sought by the employee may be granted after termination of his employment;

(c) Upon the death of the employee unless the grievance involves a question of pay; or

(d) For failure to prosecute if the employee does not furnish required information and duly proceed with the advancement of his grievance.

INFORMAL GRIEVANCE PROCEDURE

§ 771.112 Establishment of informal procedure.

Each agency shall establish a procedure appropriate to its organization and delegations of authority for the informal adjustment of grievances.

§ 771.113 Presenting grievance under informal procedure.

(a) *Time limit.* (1) An employee may present a grievance concerning a continuing practice or condition at any time.

(2) An employee shall present a grievance concerning a particular act or occurrence within 15 days of the date of that act or occurrence or the date he became aware of that act or occurrence. The agency may extend the time limit in this subparagraph for good cause shown by the employee.

(b) *Form of grievance.* An employee may present a grievance under the informal procedure either orally or in writing.

§ 771.114 Mandatory use of informal procedure.

Each agency shall require that an employee complete action under the informal procedure before a grievance concerning the same matter will be accepted from him for processing under the formal procedure.

FORMAL GRIEVANCE PROCEDURE

§ 771.115 Presenting grievance under formal procedure.

(a) An employee is entitled to present a grievance under the formal procedure if he (1) has completed action under the informal procedure and (2) presents the grievance within the time limit established by the agency under § 771.110(b)(2).

(b) The grievance shall (1) be in writing, (2) contain sufficient detail to identify and clarify the basis for the grievance, and (3) specify the personal relief requested by the employee.

§ 771.116 Processing grievance under formal procedure.

(a) The grievance shall be referred to a deciding official at a level of management designated by the agency. The deciding official shall be at a higher administrative level than any official who could have adjusted the grievance under the informal procedure.

(b) The deciding official shall attempt to resolve the grievance. If he cannot resolve the

grievance in a manner acceptable to the employee, he shall refer the grievance for inquiry by an examiner.

(c) An examiner who meets the standards of experience and training prescribed by the Commission shall conduct an inquiry on a grievance referred under paragraph (b) of this section. The agency shall provide a method for selecting an examiner who (1) is fair, impartial, and objective, and (2) does not occupy a position which is, directly or indirectly, under the jurisdiction of an official involved in the grievance or the deciding official, except when such an official is the head of the agency. If an agency desires to use an examiner from another agency, the agency shall make the arrangements. When these arrangements are made, the examiner is on a reimbursable detail to the requesting agency.

(d) The examiner shall conduct an inquiry of a nature and scope appropriate to the issues involved in the grievance. At the examiner's discretion, the inquiry may consist of:

(1) The securing of documentary evidence;

(2) Personal interviews;

(3) A group meeting;

(4) A hearing; or

(5) Any combination of paragraphs (d) (1) through (4) of this section.

(e) If a group meeting or hearing is held, a labor organization which holds exclusive rec-

ognition for the unit where the employee is located shall be given an opportunity to be represented.

(f) If a hearing is held the examiner shall conduct the hearing to conform with the following. (1) Except as provided in paragraph (e) of this section attendance at a hearing is limited to persons determined by the examiner to have a direct connection with the grievance.

(2) The hearing is conducted so as to bring out pertinent facts, including the production of pertinent records.

(3) Rules of evidence are not applied strictly, but the examiner shall exclude irrelevant or unduly repetitious testimony.

(4) Decisions on the admissibility of evidence or testimony are made by the examiner.

(5) Testimony is under oath or affirmation.

(6) The examiner shall give the parties opportunity to cross-examine witnesses who appear and testify.

(7) The examiner may exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.

(8) Both parties are entitled to produce witnesses.

(9) The agency shall make its employees available as witnesses before an examiner when requested by the examiner after consideration of a request by the employee or the agency.

(10) If the agency determines that it is not administratively practicable to comply with the request of the examiner, it shall notify him in writing of the reasons for that determination. If, in the examiner's judgment, compliance with his request is essential to a full and fair hearing, he may postpone the hearing until such time as the agency complies with his request.

(11) Employees of the agency are in a duty status during the time they are made available as witnesses.

(12) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

(13) The examiner, in his discretion, shall determine how the hearing shall be reported and shall have a verbatim transcript or written summary of the hearing prepared, including all pertinent documents submitted to and accepted by him. When the hearing is reported verbatim, the examiner shall make the transcript a part of the record of the proceedings. When the hearing is not reported verbatim, a suitable summary of the pertinent testimony shall be made. When agreed to in writing by the parties, the summary constitutes the report of the hearing and is made a part of the record of the proceedings. If the examiner and the parties fail to agree on the summary, the parties are entitled to submit written exceptions to any part of the summary, and those

written exceptions and the summary constitute the report of the hearing and are made a part of the record of the proceedings.

(g) The examiner shall establish a grievance file containing all documents related to the grievance, including statements of witnesses, records or copies thereof, and the report of the hearing when a hearing was held. On completion of his inquiry, the examiner shall make the grievance file available to the employee and his representative for review and comment. Their comments, if any, shall be included in the file.

(h) After the employee and his representative have been given an opportunity to review the grievance file, the examiner shall prepare a report of his findings and recommendations and submit that report, with the grievance file, to the deciding official. The examiner shall also furnish the employee and his representative a copy of the report.

(i) The deciding official shall accept the examiner's recommendations and issue the decision on the grievances, except that:

(1) If the head of the agency is the deciding official, he shall consider the grievance file and make the decision on the basis thereof.

(2) If the deciding official decides to grant the relief sought by the employee, he shall issue the decision accordingly without regard to the examiner's recommendations.

(3) If the deciding official determines that the examiner's recommendations are unacceptable, he shall transmit the grievance file with a specific statement of the basis for that determination to a higher level of authority, designated by the agency, for decision. The deciding official shall also furnish the employee and his representative a copy of that statement.

(j) The decision on the grievance shall be in writing and shall contain findings on all issues covered by the examiner's inquiry.

NEGOTIATED GRIEVANCE SYSTEMS

§ 771.117 Negotiated grievance systems.

This subpart does not apply to a grievance system established through a negotiated agreement between an agency and a labor organization to which exclusive recognition has been granted.

COMMISSION ACTION

§ 771.118 Employee requests for review.

The Commission does not act on a request by an employee for a review of an agency's action under an agency grievance system.

§ 771.119 Review of grievance systems.

The Commission reviews agency grievance systems through its inspection activity. When it finds that a system or operations thereunder do not conform with the requirements of this part, the Commission requires corrective action to bring the system or operations into conformity.

UNITED STATES GOVERNMENT

U. S. SECRET SERVICE

Memorandum 230.4

FROM: Director March 4, 1976

TO: All Special Agents in Charge

FROM: Director

SUBJECT: Policy Statement on Career Development, Transfers and Reassignment

Reference is made to the previous memoranda on this subject, same file number.

Attached is the plan for GS-1811 employees of the United States Secret Service. This transmittal memorandum is introductory and explanatory and will be considered a part of the plan.

This plan is general in nature and is intended as a guideline for all 1811's. In today's sophisticated and complex bureaucracy with constantly changing workload, obligations, requirements and duties there is *no* plan which can be specific and rigid. The answer is guidelines and general policy statements.

This plan should be a useful tool, not only for Special Agents, but also for supervisors and managers who can refer to it for both immediate and long range planning.

This plan cannot and will not satisfy the needs of *everyone*. It will however be beneficial to the great majority of 1811's.

A quick reading of the plan will reveal several important policy decisions:

1. A newly hired agent will be permanently transferred between his second and fifth year of employment.
2. While still at the journeyman level (GS-12) he may be again permanently transferred.
3. Additional permanent transfers may be made according to the needs of the Service.
4. To be considered for promotion into the GS-13 level and/or supervisory/manager level it is *not* necessary to have been permanently assigned to a permanent protective detail. Given the present numbers of Special Agents and the *relatively* few permanent protective and allied positions it is no longer numerically possible for *every* agent to serve in that capacity.

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80-1477

No.

Office-Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOUIS R. CRUZ,

Petitioner,

v.

H.S. KNIGHT, Director,
United States Secret Service,

Respondent.

AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF

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THE INTEREST OF THE AMICUS CURIAE

The Federal Law Enforcement Officers Association, the *amicus curiae* herein is a nationwide organization of approximately 5,000 federal law enforcement officers. Its purposes include the mutual advancement of law enforcement officers and the promotion of its members' welfare. The Association also provides a vehicle through which federal law enforcement officers may collectively speak on matters affecting their welfare.

Counsel for the respective parties have graciously consented to permitting the Federal Law Enforcement Officers Association to file this brief. The matters raised in the within action are of great concern to all federal law enforcement officers. The rights of employees facing reassignments together with the circumstances under which they may challenge a reassignment are matters of ever increasing concern to our Membership. Substantial private rights are involved. The Federal Law Enforcement Officers Association believes that the fullest airing possible should be given to this most important issue especially in light of conflicting lower court cases involving the extent to which an employee reassignment may be judicially reviewable.

ARGUMENT

The *amicus curiae*, Federal Law Enforcement Officers Association, can add little to the arguments of petitioner. However, some points must be emphasized.

Firstly, it is important to note that the petitioner does not ask this Court to undertake a full substantive review of respondent's determination. However, petitioner does pray that this Court ensure that his procedural rights were satisfied. This, the Court must do.

Even those cases which have determined that employee reassignment matters are generally not judicially reviewable have recognized that an exception lies when there is a question of procedural regularity. *Bullard v. Webster*, 623 F. 2d 1042 (5th Cir. 1980); *Leefer v. Administrator, NASA*, 543 F. 2d 209 (D.C. Cir. 1976). For example, the court in *Leefer* while recognizing that federal agencies have broad authority to reassign their employees nevertheless ruled:

> Discretion primarily lies in the hands of the administrative agencies involved, and the courts will not substitute their own judgment for that of the agency's. Review is thus limited to whether the agency denied the employee his appropriate procedural rights and whether the decision to remove the employee was arbitrary and capricious. *Id.* at 214.

That federal employees be afforded their procedural rights is most important. These protections ensure that an agency will not be permitted to hide behind vague assertions which would not find a scintilla of support in the record or in common sense. A review of petitioner's case indicates that respondent has never defined the "need" to reassign petitioner. Respondent has not shown which aspects of petitioner's training, experience and value necessitates his transfer despite the extensive counterbalancing factors which have been well documented.

The grievance procedural safeguards which have been provided to petitioner seeks to prevent this problem. Agencies must supply some accountability to their agencies. Petitioner is not asking for anything other than that which he is entitled. He is merely attempting to compel the respondent to adhere to its own regulations. Unfortunately, the respondent has heretofore refused to do so.

Should this Court not grant the petition; all agencies will have a

license to disregard with impunity the fundamental procedural regulations that they themselves create. This occurrence will be most dangerous to all government employees. Thus, for reasons stated in the petition, a writ of certiorari should issue.

CONCLUSION

The *amicus curiae*, Federal Law Enforcement Officers Association, respectfully requests that this Honorable Court should issue a writ of certiorari to review the judgment and order of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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